

C064293

**CALIFORNIA COURT OF APPEAL
FOR THE THIRD APPELLATE DISTRICT**

**COORDINATED PROCEEDINGS SPECIAL TITLE
(RULE 3.550)**

QSA COORDINATED CIVIL CASES

Appeal From Judgment Entered February 11, 2010
Sacramento Superior Court Case No. JCCP 4353
Coordination Trial Judge The Honorable Roland L. Candee, Department 41

**COUNTY OF IMPERIAL
CROSS-APPELLANT'S REPLY BRIEF**

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INTRODUCTION

In their cross-responding briefs, the Imperial Irrigation District (IID), San Diego County Water Authority (SDCWA), Metropolitan Water District (MWD), Coachella Valley Water District (CVWD), and the State of California (State) maintain that the California Environmental Quality Act (CEQA) claims are moot, that they should not be addressed on the merits, and that the County of Imperial (county) is not protected by the California wheeling statute. These cross-respondents even refuse to brief the CEQA merits that the county and Imperial County Air Pollution Control District (air district) (collectively, county agencies) have placed at issue. As the last brief to be filed in this appeal of, the county agencies confine their reply to the points raised in the cross-responding briefs.

The county hereby incorporates the separately-filed cross-appellant reply brief of the air district, and reiterates the incorporation, in its opening brief, of the county agencies' response to the appellants' petition for writ of supersedeas. This brief also relies on the county agencies' concurrently-filed second request for judicial notice.

I. THE WATER AGENCIES' DELIBERATE DECISION TO EVADE THE CEQA MERITS FURTHER COMPELS THIS COURT TO ADDRESS AND RESOLVE THEM.

A. Overview: This Court Can, and Must, Resolve the CEQA Merits.

The water agencies, which collectively submitted *564 pages* of briefing on CEQA issues in the superior court, have taken the remarkable, and remarkably risky, strategy of providing *no briefing at all* on the CEQA merits issues in this appeal, despite extensive presentation of these issues in the cross-appellants' briefs and denial of the water-agency motion to strike

that briefing in this Court.¹ Since these agencies had long since been clearly informed of the county agencies' intention to include CEQA merits briefing in the cross-appeal, they neither claim any surprise as to the cross-appellants' CEQA briefing, nor relief from their failure to join it on the merits.²

As noted in *Woodward Park Homeowners Association v. Garreks* (2000) 77 Cal.App.4th 880, 890, “[a]pparently the City and Garreks buy into the philosophy of the mythical captain of the Starship Enterprise, James T. Kirk, who said: ‘May fortune favor the foolish.’ We do not. Garreks’s decision to complete and operate the project, despite the pending litigation, in no way provides an exemption to CEQA.” Similarly, the water agencies’ failure to brief CEQA provides them no exemption from a ruling on the merits, any more than it exempts them from an order that the QSA program be enjoined until CEQA compliance is adjudicated.

As detailed below, this Court is fully capable of addressing the cross-appeal’s CEQA merits issues on the briefs submitted. First, the water

¹ The closest the water agencies come to providing briefing is a footnote in the SDCWA/CVWD/MWD brief, which contains record references to the trial court CEQA briefing. *Op. cit.* 90, n. 73. But even that footnote provides no content at all, besides listing the citations.

² In the county agencies’ supersedeas response of March 31, 2010, the water agencies were informed that the county and air district would brief the CEQA merits in their respective cross appeals, and provided a nine-page summary of those merits. *Op. cit.* 50-59. In requesting and being granted additional pages for their cross-appellants’ briefs, on October 8, 2010, the county and air district again confirmed their purpose to brief these claims as warranting the extra pages granted. In sum, the water agencies have had many months in which to prepare from their extensive trial court briefing their arguments against the CEQA claims here.

agencies have already unsuccessfully raised essentially the same objections, including jurisdictional objections, to this Court's resolution of all CEQA issues as part of the cross-appeal. Second, the water agencies' strategic decision to omit CEQA merits issues from their briefs in no way disables the Court from resolving the CEQA merits. Rather, the merits may be deemed submitted on the cross-appellants' briefs. Third, the water agencies' jurisdictional and procedural objections are unfounded. Without the necessity of taking original jurisdiction, the CEQA merits are at issue in the cross-appeal, and the Court is capable of resolving them. Indeed, as detailed in section II.A, *infra*, following eight years of delay, this Court *must* resolve the CEQA merits to avoid catastrophic damage to the Salton Sea and Southern California air quality that may otherwise occur during a years-long remand to the trial court.³

B. The Court Expressly Denied the Water Agencies' Attempt to Remove the CEQA Merits from the County Agencies' Cross-Appeals.

On December 3, 2010, SDCWA, CVWD, and MWD moved to strike the portions of the cross-appellants' opening briefs that include the CEQA merits. The grounds for doing so were the same as those now advanced in the same parties' respondents' brief (see, e.g., 195-200); namely, that the Court needed but did not have original jurisdiction to consider these claims in the first instance on appeal. On December 6, 2010, the county agencies submitted a preliminary opposition. On December 9, 2010, this Court denied that motion to strike in its entirety.

³ As argued by the Air District in its cross-appellants' reply brief (sections IV-VII), the superior court also erroneously dismissed as moot claims arising under the Clean Air Act.

C. The Water Agencies' Failure to Address the Cross-Appellant Briefs Does Not Disable this Court from Resolving the CEQA Merits.

Seeking to leverage its opportunity to avoid the CEQA merits on appeal and cover itself as well, the water agencies disingenuously request the opportunity for supplemental briefing in the event that the Court “chooses” to consider the CEQA merits. (SDCWA/CVWD/MWD RBrief 195, n. 77.)⁴ But they fail to disclose that on December 20, 2010, the same agencies applied to the Court for leave to file a joint reply/cross-respondents’ brief in excess of the ordinary word limit, citing in support of their request the fact that cross-appellants’ opening briefs total “325 pages and 86,107 words” which “the Water Agencies must now respond to” (*Op. cit.* 3, n. 4.)⁵ On December 22, 2010, the Court granted leave for the agencies to file a combined brief of up to 84,000 words. But as reflected in the errata to this brief these water agencies filed on January 12, 2011, they only used 57,875. Having deliberately elected not to use 26,125 words for which they had obtained leave of Court, the water agencies have waived any credible claim for supplemental briefing to address issues they purposefully omitted.

Moreover, further briefing is not necessary to resolve the CEQA merits issues, which received unusually extensive briefing at trial, and have been familiar to the parties for years. Under well-established California

⁴ RBrief means an appellant’s reply/cross-respondent brief. R/XABrief means a cross appellant’s respondent/cross-appellant brief. OBrief means an appellant’s opening brief.

⁵ The water agencies also represented that the extra words requested were in part to address “whether this Court should exercise original jurisdiction over the CEQA cases on appeal and decide their merits.... SDCWA/CVWD/MWD Application to File a Joint Reply/Cross-Respondents’ Brief in Excess of Word Limit 5.

procedure, “[a] contention raised in the appellant’s brief to which respondent makes no reply in its brief will be deemed submitted on the appellant’s brief, and the sole issues are those tendered therein.” (4 Cal.Jur.3d (2007) Appellate Review, § 610.) For example, in *County of Butte v. Bach* (1985) 172 Cal.App.3d 848, 867, neighbors argued the trial court erred in denying injunctive relief enforcing the restrictive covenant. The Court noted: “The Bachs make no reply to the neighbors’ contention. Accordingly, we deem the matter submitted on the neighbors’ brief and that the sole issue is that tendered therein. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, §§ 425, 438-440.) The contention is meritorious.” (See also *California Insurance Guarantee Assn. v. Workers’ Compensation Appeals Board* (2005) 128 Cal.App.4th 307, 316 n. 2.)⁶

Finally, the cross-respondents’ ream of CEQA merits briefing in the record on appeal enables this Court to test the cross-appellants’ CEQA claims against the cross-respondents’ CEQA defenses.

D. This Court May Resolve the CEQA Merits Without Resorting to Original Jurisdiction.

For reasons amply discussed in the air district’s cross-reply brief (pp. 34-39) and incorporated by reference here, this Court clearly has jurisdiction over the CEQA merits as part of the county agencies’ cross-appeal, including the merits of the environmental claims. (See *Leone v. Medical Board of California* (2000) 22 Cal.4th 660, 666 (appellate court has jurisdiction over direct appeals).) As the air district details, while the Court *could* take original jurisdiction over these claims, it has no need to do

⁶ Unlike the wholesale exclusion of a major issue in the case, an individual point of law raised by appellant without response will not necessarily be deemed a confession of the point. See *Berniker v. Berniker* (1947) 30 Cal. 2d 439.

so here. (*See Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 758, n. 9 (respondent that files a cross-appeal can obtain affirmative relief by way of appeal).) The Court can grant such relief because this issue is within the scope of the county agencies' timely filed cross-appeal.(Supp.AA:219:2062:54610-54626; Supp.AA:219:2063:54627-54643.)⁷

II. PROMPT ADJUDICATION OF THE ENVIRONMENTAL CLAIMS CANNOT BE AVOIDED ON MOOTNESS GROUNDS.

A. Overview: Review of Environmental Compliance is Urgently Needed Before the Salton Sea Recedes into Irreversible Decline.

1. Because the QSA Has Proceeded Notwithstanding Its Challenge from Inception, Delay Will Increase Severe Public Health Risks.

Without this Court's action, 2011 will mark the *eighth year* without adjudication of the county agencies' CEQA merits.⁸ Two simple facts highlight the grave prejudice stemming from this extraordinary delay. First, the Salton Sea Authority's fifteen-year "doomsday clock" has already passed the halfway point, leaving the real prospect that the water agencies will allow the sea to die before CEQA review can enforce complete and effective mitigation. (County R/XABrief 79-80.) Indeed, while they do not

⁷ Moreover, this case does not resemble ones that require further trial court assessment due to deficiencies in the record. See, e.g., *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 44-45; *California Statewide Communities Development Authority v. All Persons* (2007) 40 Cal.4th 788, 807 n. 11.

⁸ IID's irresponsible and untruthful claims that the county inflicted this delay are responded to in section II.F, *infra*, at 26-28.

consider it a certainty, the water agencies continue to rely on such a prospect to reduce costs in the event that the billions of dollars potentially required for restoration funding do not materialize before the clock runs out. (SDCWA/CVWD/MWD RBrief 23; IID RBrief 21.) Second, IID concedes that as early as 2012, salinity may undermine the viability of the Salton Sea's fishery, a development it also presents as an *opportunity to reduce mitigation costs*. (IID RBrief 23; see Vol-10:Tab-227:AR3:CD18:526927-526929.)

In this setting, further delay in resolution of the environmental claims could be deadly as well as unlawful, compounding the risks of toxic dust clouds emerging at the Salton Sea, and producing the health risks extensively documented by the air district. (Air District R/XABrief 73-79, 87-88.) These risks belie IID's claim that no "Catch-22" would arise from deferring CEQA claims to the indefinite future. (IID RBrief 89.) When the water agencies petitioned this Court for a writ of supersedeas last year, they opined that the QSA was too important to fail solely because of a "perceived infirmity" in the QSA-JPA. Insisting that the QSA remain in place, they described the QSA-JPA as having only the "limited purpose" of funding "environmental mitigation" and implementing the State QSA legislation. (Water Agencies' Supersedeas Petition 18.)⁹

That sense of urgency is conspicuously absent from the water agencies' discussions of still-unresolved CEQA challenges to the QSA

⁹ The water agencies' attempt to minimize the import of the QSA-JPA's commitments is highly misleading. That agreement confirms that the water agencies' own mitigation funding commitments "would not have been made" without the State's financial promise, which was the "principal mechanism" to ensure compliance with federal and state environmental law. Vol.-8:Tab-172:AR3:CD1:104567.

EIRs, even as the Salton Sea approaches irreversible decline. Supporting the superior court's dismissal of environmental challenges to the QSA EIRs as moot, the water agencies now portray as "entirely speculative," "hypothetical," or "unknown and undefined" whether they will even proceed with the QSA, or try to rely upon its still-certified environmental documents, if the validation judgment is affirmed.¹⁰

But the statutory "environmental mitigation requirements" that frame the obligations of the State and water agencies draw their very definition from the same challenged "environmental review process." (Vol-9:Tab-209:AR3:CD14:400290 (Stats. 2003, ch. 654, § 3(d)). Thus, the State's "unconditional" obligation may well prove to be significantly more costly if the cross-appellants' CEQA challenges are ultimately sustained.¹¹ Moreover, as shown in section IX.2 of the Air District's cross-appellant's reply brief, the State's latest attempts to maneuver around its "unconditional" commitment undermine any assurance that the mitigation referenced in the water agencies' CEQA documents will actually occur.

¹⁰ See SDCWA/CVWD/MWD RBrief 186 ("entirely speculative"); IID RBrief 86 ("unknown and undefined"), 88 ("hypothetical").

¹¹ The water agencies use deceptive accounting techniques, attempting to minimize the State's anticipated costs. For example, they translate the 2003 present values from the QSA-JPA into projected payments over the life of the agreement, without disclosing their methodology for doing so. See, e.g., IID RBrief 2; SDCWA/CVWD/MWD OBrief 44. Even assuming *arguendo* that their calculations were correct, these projections are not applied consistently. For example, the projected *mitigation and restoration costs* as projected in 2003 receive no similar extrapolation. See, e.g., IID RBrief 15, n. 8.

2. The Water Agencies' Argument that the Environmental Claims Are Moot Rests Upon Dispositive Legal Errors.

Here the superior court judgment left a crucial ambiguity, because it invalidated QSA contracts, but did not expressly vacate the water agencies' project approvals and left in place the certifications of the projects' EIRs. Contrary to the premise of mootness, setting aside these certifications and approvals would provide effective relief, preventing a quagmire from emerging over the role of those EIRs in project review.

By contrast, as detailed below, the cross-respondents' mootness defense reveals several dispositive errors. First, the water agencies incorrectly suggest that the superior court's mootness determination is entitled to deference under the substantial evidence test. But by assuming that leaving the EIR certifications in place would have no practical consequence, and failing altogether to consider well-recognized mootness exceptions, the superior court committed errors of law subject to this Court's *de novo* review.

Second, far from allaying concerns about leaving the EIR certifications in place, the cross-respondents' contradictory responses unwittingly confirm that a Pandora's Box of procedural complications will be opened if the status of the QSA's CEQA documents remains unaddressed. The water agencies concede that, although the superior court did not expressly say so, the *project approvals* were "effectively voided" by the court's "invalidation of the underlying agreements." (SDCWA/CVWD/MWD RBrief 187, n. 72; IID RBrief 87 ("there would be no QSA project approvals" if judgment were affirmed).)

But the cross-respondents contradict each other each other on the status of the EIRs. The State argues that the EIRs simply cannot "survive"

the superior court's determination of unconstitutionality. (State RBrief 29.)¹² The water agencies argue the opposite, contending that these never-adjudicated documents not only survive the invalidation of the underlying approvals, but may be relied upon in future decision-making if the agencies so choose. (SDCWA/CVWD/MWD RBrief 188; RT-1/19/10:12:3387; IID RBrief 85-86.)

These arguments eviscerate the premise that judicial review of the water agencies' CEQA compliance has become "irrelevant." (IID RBrief 89.) Evasion of the environmental merits is likely to ensure years of further conflict, and is likely to dramatically affect the scope and standard of review. Even if the superior court had framed its judgment in a way that truly rendered the EIR approvals moot, merits review would still be urgently needed due to the likelihood of recurrence and public importance of the Colorado River transfers. The merits must be addressed now, before time runs out for both the Salton Sea and the integrity of the CEQA process.

B. Mootness Supports Dismissal Only When a Ruling Can Have No Practical Effect, or Cannot Provide Effective Relief.

California courts are only empowered to dismiss an action as moot "when a court ruling can have *no practical effect* or *cannot provide the parties with effective relief*." (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1380 (emphasis added); see also SDCWA/CVWD/MWD RBrief 179 (quoting *Rish*, without emphasis).) Thus, when an event occurs that

¹² "The respondent-appellants claim that the CEQA issues in the present case are not moot because the environmental reports survive the ruling of unconstitutionality, and therefore this Court should consider the CEQA issues. This is not so. If the QSA agreements are unconstitutional, there is no project to consider under a CEQA review." State RBrief 29.

“renders it impossible” for the Court to grant “any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.” (*Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation and Park District* (1994) 28 Cal.App.4th 419, 425 (finding CEQA appeal technically moot, but adjudicating the merits under the public interest/likelihood of repetition exception to automatic dismissal).)

Attempting to broaden the circumstances supporting dismissal, the water agencies contend that an appellate court reviews determinations of mootness “for substantial evidence,” and that *de novo* review is inapplicable. (SDCWA/CVWD/MWD RBrief 178.) Read in context, their cited cases only apply to appeals turning centrally on determinations of fact. In *Giraldo v. California Dept. of Corrections and Rehabilitation* (1998) 168 Cal.App.4th 231, where an inmate’s parole mooted the request for injunctive relief, the court noted that “nothing could come” of an exercise of its discretion, because the issues were “essentially factual” and the court lacked an “adequate record” to address the equities. (*Id.* at 259.) Likewise *Bocato v. City of Hermosa Beach* (1984) 158 Cal.App.3d 804, 808, dismissed as moot a claim for refund of fees in an action challenging the city’s preferential parking program, because factual testimony established that refunds had been offered.¹³

By a contrast here, the cross-appeal focuses on the superior court’s dismissal of the environmental claims despite an available remedy (setting aside the approvals and EIR certifications) that could have provided effective relief, failure to consider whether the standard exceptions to

¹³ As made clear in *Bocato*, 158 Cal.App.3d at 808, the court drew its standard of review from *Bullis v. Security Pacific National Bank* (1984) 21 Cal.3d 801, 805, which delineated the standard of review governing appeal of a trial court’s findings of fact. Mootness was not an issue in that case.

mootness apply, and failure to consider how the “project” would be understood in later review. These are issues of law requiring the Court’s *de novo* review. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 127, 131.) In its *de novo* review of “whether the agency has employed the correct procedures,” the court must also “scrupulously” enforce all “legislatively mandated CEQA requirements.” (*Id.* at 131.)

C. The Environmental Claims are Not Moot.

1. The Superior Court Refused to Set Aside the EIR Certifications.

In its trial briefing, the county explained that if the court invalidated the QSA contracts while not addressing the water agencies’ approvals of the environmental documents supporting the QSA, it would fail to contain the risk of false reliance on these documents in highly anticipated future proceedings on the QSA. (AA:26:188:06936-06939.) Invalidation of the contracts would therefore not moot the continuing controversy over the status of these documents.¹⁴

After the completion of briefing and on the verge of the CEQA portion of the trial, the superior court refused to hear any of the environmental claims and defenses pending (cases ECU016353, ECU01656, ECU01658), and abruptly canceled phases 1B and 1C of trial. On December 10, 2009, the trial court’s tentative ruling invalidated all but one of the 13 QSA contracts at issue, and vacated the remaining environmental claims as moot. (AA:46:267:12339-12365.) The county agencies challenged the mootness determination in pleadings and oral

¹⁴ The county and other category 2 parties made this point repeatedly in the trial court. See RT-1/22/09:6:1593-1599; Supp.AA:160:1623:039816-039817; 11/30/09: RT-11/30/09:11:3035-3038; AA:46:270:12379.

argument. (AA:46:270:12377-12384; RT-12/17/09:12:3337-3340.) Nonetheless, the superior court rejected this challenge, summarily concluding in its statement of decision: “The Court does not intend to deprive any party of its opportunities to litigate its claims. The Court *simply cannot justify trying claims predicated upon contracts the Court has found invalid.*” (AA:47:292:12752 (emphasis added)).

In its February 4, 2010 comments on the proposed judgment, the county agencies attempted to contain potential prejudice stemming from a determination of mootness, suggesting (without waiving objections to the mootness determination) that the superior court 1) confine its mootness determination to the validation proceeding; 2) dismiss the remaining cases with environmental claims (ECU016353, ECU01656, ECU01658) without prejudice; and 3) set aside the water agencies’ approvals of environmental documents without reaching the merits. The county agencies specified the 18 agency approvals that should have been set aside, including approvals of the water agencies’ EIRs and addenda, as well as the underlying project approvals. (AA:48:303:12878-12880; RT-2/11/10:12:3416-3417; AA:48:309:13029.) However, the trial court entered its final judgment on February 11, 2010, without making the county agencies’ requested changes. (AA:48:312:13071-13072.)

2. Setting Aside Both the EIR Certifications and Project Approvals Would Provide Effective Relief, Preventing Reliance on Prior Review As the Baseline for Future Environmental Assessment.

Attempting to portray the still-existing EIR certifications as benign or irrelevant, the cross-respondents labor to refute a red herring: that if the current EIRs are relied upon in new project approvals, these new approvals would *evade review entirely*, without any possibility for renewed legal

challenge to the new project decision, a claim the county agencies have never advanced.¹⁵

In fact, those challenging the QSA EIR never made that categorical argument. Instead, they argued that failure to set aside both the approvals and EIR certifications would facilitate unwarranted reliance on these faulty environmental documents, allowing agencies to rely in whole or part upon their conclusions. (See Pub. Res. Code, § 21167.3 (responsible agency reliance on lead agency's EIR); County R/XABrief 84 (existing documents might be recertified verbatim, utilized with an uncirculated addendum under CEQA Guidelines §15164, or used with a narrowly focused supplemental or subsequent review under CEQA Guidelines § 15163).)

Leaving the current certifications in place under these circumstances could narrow the scope of new environmental review and impose far more stringent constraints on future challenges. (See Pub. Res. Code, § 21166 (describing triggers for supplemental or subsequent review when an EIR has already been prepared).) In short, far from being innocuous, allowing the EIR certifications to remain in place could potentially undo seven years of extraordinary efforts to secure a CEQA hearing, leaving the county agencies and POWER in the same position they might have faced if the

¹⁵ IID refutes the imagined premise that the county agencies and POWER will be “deprived of their day in court concerning environmental compliance.” IID RBrief 86. The State rebuts the notion that the existing EIRs could be used “without any further review,” observing that any new project approvals would cause the statute of limitations to “commence anew.” State RBrief 31-32. SDCWA, CDWA, and MWD contest the cross-appellants’ alleged concern that “the existing environmental documents would evade review” if the QSA were readopted. SDCWA/CVWD/MWD RBrief 186.

existing EIRs had been upheld on the merits or never challenged. (See, e.g., *Committee For Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 56 (where no new EIR or negative declaration is prepared, challenge may be limited to whether subsequent or supplemental review should have been prepared).)

Despite preparing dense and lengthy cross-respondents' briefs, the water agencies have remarkably little to say about the risk that environmental challenges may be truncated or thwarted through attempted application of Public Resources Code section 21166. IID posits that this statute only applies to subsequent discretionary approvals relying on an EIR for a *previously approved project*, and that affirming the validation judgment would mean "there would be *no QSA project approvals*." (IID RBrief 87 (emphasis added); see also SDCWA/CVWD/MWD RBrief 187, n. 72 (asserting that project approvals were effectively voided.) But this response oversimplifies a complex problem. On its face, section 21166 focuses on *preparation and certification of an EIR*, rather than project approvals *per se*.¹⁶

¹⁶ "When an environmental impact report *has been prepared* for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report *was certified* as complete, becomes available."

Pub. Res. Code, § 21166 (emphasis added).

Moreover, the cases cited by IID confirm the county agencies' concerns about the risks arising from allowing EIR certifications to stay in place. In *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, the county's approval of a tentative map (originally supported by a mitigated negative declaration) had expired during the litigation and was no longer effective. The project proponent challenged the county's determination that an EIR was required for the new approval of the same tentative map. The court of appeal held that the need for a *new government approval* did not qualify the action as a new "project" under CEQA. (*Id.* at 1056.)¹⁷

Moss found that one minor change in the project activity (completion of a road improvement previously required as mitigation) was hardly sufficient to render the project a new one, in light of more extensive changes previously found insufficient to make a project new. (162 Cal.App.4th at 1056, n. 7 (citing *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1071-1072, where the change from shopping center to a Walmart superstore did not qualify as a new project).)

Because the new approval required was not deemed a new "project," *Moss* held that resubmission of the tentative map was not subject to "full CEQA review" and could only be tested for whether "supplemental

¹⁷ "CEQA defines the term 'project' broadly as an *activity* that may cause physical changes to the environment. ([Pub. Res. Code] § 21065; see also CEQA Guidelines, §15378, subd. (a) [defining 'project' as 'the whole of an action'].) The Guidelines also explain, 'The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. *The term 'project' does not mean each separate governmental approval.*" *Moss*, 162 Cal.App.4th at 1056 (citing CEQA Guidelines, § 15378, subd. (c), italics added in case text).

environmental review” was required under section 21166. (*Id.* at 1057.)

Explaining the latter standard, *Moss* noted that

the statutory presumption flips in favor of the developer and against further review. [S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired ... and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process.

(*Id.* at 1051-1051 (emphasis added).)¹⁸

If the QSA’s EIR certifications remain in place, *Moss* would therefore not prevent the prospect that the agencies might, after attempting a “constitutional fix” in the QSA contracts, present the QSA transfer and program as an old, previously reviewed project whose subsequent environmental review can be strictly limited under Public Resources Code section 21166. Similarly, *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, found the relationships between approvals (development agreement and use permit/design review) governed by section 21166, rather than the standard for “new” approvals.¹⁹ Finding

¹⁸ Applying section 21166, *Moss* required supplemental review only because of significant new information regarding water supply impacts on one of the cities and impacts to species of special concern. It limited the new review to those issues. *Id.* at 1067.

¹⁹ In *Megaplex-Free*, 149 Cal.App.4th at 98-100, the City of Alameda approved a development agreement and certified a mitigated negative declaration in May. In August, the city passed a resolution upholding the planning commission's approval of a requested use permit and design reviews. In November, the city passed a resolution to uphold the planning commission’s approval of a use permit for one aspect of the project. The city issued notices of determination for all of these actions. The plaintiffs brought their action in October (and submitted an amended complaint after the November decision, challenging that action as well).

that the applicable limitations period had expired for challenges to either the development agreement or certification of the mitigated negative declaration, the court noted that section 21166 “represents a shift in the applicable policy considerations. The low threshold for requiring the preparation of an EIR in the first instance is no longer applicable; instead, agencies are prohibited from requiring further environmental review unless the stated conditions are met.” (*Id.* at 110 (citing *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1017-1018); see also *Laurel Heights Improvement Assn. v. Regents* (1993) 6 Cal.4th 1112, 1119-1132 (discussing relationship between two phases of environmental review).)

In short, neither the water agencies’ perfunctory discussion of CEQA case law, nor their elliptical and internally inconsistent statements about future CEQA review (IID RBrief 86-88; SDCWA/CVWD/MWD RBrief 186-187; State RBrief 31-32), show that the environmental claims are moot. Rather, the superior court could and should have granted effective relief, by reaching the environmental claims and ordering the set-aside of *both* the approvals and EIR certifications.

In this respect, the superior court’s disposition of the QSA contracts’ validity strongly resembles the disposition of unlawful detainer proceedings in *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425. Nothing in that phase of the proceedings “can or will resolve the issue of CEQA compliance, therefore, this court’s ruling will have a practical effect on compliance with mitigation conditions,” and will also “provide relief” to the category 2 parties that have raised environmental challenges.

County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern (2005) 127 Cal.App.4th 1544, which invalidated a biosolid impact fee

and declined to hear certain contract claims based on factually distinct scenarios, also rejected a mootness objection to a claim that could “provide effective relief.” The outcome of that claim could result in additional environmental assessment that “could lead to mitigation measures” affecting the performance of the contract. (*Id.* at 1629-1630.) Likewise, setting aside the approvals and EIR certifications here could lead to stronger mitigation measures, enhancing environmental protection and protecting against the emerging air quality disaster at the Salton Sea.

3. If the EIRs Lacked Efficacy Due to QSA Contract Invalidation, the Water Agencies Would Not Consistently Attempt To Keep their Certifications Alive.

An “aura of unreality” pervades the water agencies’ repeated suggestions that merely considering the cross-appellants’ environmental claims would amount to an “idle act.” (SDCWA/CVWD/MWD RBrief 186 (“idle act”); see *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 912 (“aura of unreality” surrounding discussion of water contract shortage provisions).) If retaining the EIR certifications were truly so inconsequential, why would the cross-respondents (other than the State) fight so adamantly to ensure that they are *not set aside*, even after invalidation of the QSA contracts?

CEQA adjudication of the merits, which should have occurred years ago, would have effectively provided this relief. Following trial, but before final judgment, the county agencies made a detailed alternative suggestion, proposing to the Court that by expressly setting aside the EIR certifications and project approvals in light of the determination of invalidity, the judgment could achieve actual mootness and contain the risk of reliance on the never-adjudicated EIRs. (See, e.g., AA:47:294:12772-12774; AA:48:303:12878-12880.) But MWD vehemently opposed even this mild

attempt at formulating true mootness, insisting to the superior court that it somehow amounted to a “substantive judgment” on the CEQA claims, and that it was unnecessary to clarify the status of CEQA documents beyond deeming the issues moot.²⁰ The lack of mootness may therefore partly reflect MWD’s active resistance to vacating the EIR certifications.

Similarly, the cross-respondents’ brief of SDCWA, CVWD, and MWD, even after acknowledging that the court’s invalidation of underlying agreements “effectively voided” the project approvals, argued against reaching the same result for the EIR certifications. (*Op. cit.* 187-189.) The basis for that resistance is slightly unclear; the brief in one place simply says that “environmental documents are not automatically invalidated when underlying approvals are struck down”; in another, it alleges it would “violate the law” for a court to “decertify” EIRs without adjudicating their adequacy. (*Id.* 188, 189.)

The three water agencies’ suggestion of legal impropriety in setting aside the EIRs is easily dispatched. The county agencies’ suggested modifications of the proposed judgment made clear that the dismissal of the

²⁰ “They are basically asking in this judgment that the Court invalidate all of the CEQA determinations. And they are saying that’s necessary in order to deem these CEQA claims moot. And we think it is the reverse. When the Court says the CEQA claims are moot, it means it is not adjudicating those claims and it is not going to issue a substantive judgment invalidating those CEQA claims. ¶ And so this is the type of judgment that would be submitted after a CEQA adjudication, not one that’s compatible with the Court’s determination that these issues are moot. ¶ And the basic rationale, as I understand from the statement of decision, was these agreements are being invalidated on a non CEQA ground; therefore, it is moot whether CEQA was complied with with an invalid agreement. There is no reason to reach that sort of issue.” RT-1/19/10:12:3387 (MWD counsel).

environmental claims as moot would be “without prejudice,” and would be made “without the Court reaching the merits of the issues presented.” (AA:48:303:12828.) Thus, these proposed modifications were not an attempt to impose a remedy for CEQA deficiency (see Pub. Res. Code, § 21168.9(b)); nor would they order a public agency to exercise its discretion in a particular way (Pub. Res. Code, § 21168.9(c)). Rather, they would have reduced to language something closer to the State’s expectation that if the project is vacated, its EIR should be vacated as well. (State RBrief 36.) But the judgment, in the form signed, lacks that assurance.

Ironically, as discussed above, one possible consequence of the water agencies’ resistance to addressing EIR certification is the continued reliance on EIRs subject to a ongoing CEQA challenge left unresolved after nearly eight years. None of the water agencies’ cited cases come close to supporting that result. For example, in *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172, no CEQA document was prepared; the claim that a settlement agreement required CEQA analysis was mooted by the voiding of the agreement as an unconstitutional relinquishment of police power. In *Save Tara*, 45 Cal.4th at 127, the petitioners challenged a development agreement and sought preparation of an EIR. The court found that preparation and certification of an EIR while the action was pending did not moot the appeal, because petitioners could still be awarded requested relief: an order that the city set aside approval of the agreement.²¹

²¹ Other cited cases involve EIRs that were set aside. In *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, the court vacated project approvals and decertified the EIR, but was not required to address another CEQA claim. In *Planning and Conservation League*, 83 Cal.App.4th at 925, the court ordered EIR decertification and

**D. Even if the Environmental Claims Had Been Moot,
Resolving the Environmental Claims Would Remain
Necessary.**

Even assuming, *arguendo*, that the environmental claims had been moot, the long-overdue CEQA merits would still need to be addressed, because this case presents a textbook illustration of all three well-established exceptions to mootness: this case presents an issue of broad public interest; there is likely to be a recurrence of the controversy between the parties; and, a material question remains for the Court's determination. (*Cucamongans United For Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480.)

Notably, the cross-respondents virtually ignore the detailed analysis in the cross-appellants' opening briefs demonstrating that each of these factors is present. (County R/XABrief 86-88; Air District R/XABrief 83-86.) In fact, it would be hard to conceive of a subject of broader public interest than ensuring that the environmental review supporting the largest proposed water transfer in American history does not become a *fait accompli* without ensuring full CEQA compliance, reviewed and implemented in time to avert a modern Dust Bowl at the Salton Sea. Moreover, both the representations made to the Court in support of supersedeas, and the water agencies' efforts to forestall the setting aside of the EIRs even after contract invalidation, speak to the extremely strong likelihood of recurrence. And given the lack of any CEQA merits adjudication on cases originally filed in 2003, it is undeniable that material questions remain unresolved.

ordered a different lead agency, DWR to prepare a new EIR; nonetheless, the court reviewed enough other claims to ascertain that the EIR was prejudicially defective and needed to be completely redone.

Even in circumstances with far less on the line than the future of water allocations and environmental quality in vast parts of California, courts have found that “this issue and the principles involved in the interpretation of CEQA are of public importance and are likely to arise in the future.” (*Friends of Cuyamaca Valley*, 28 Cal.App.4th at 925 (addressing CEQA procedures for duck hunting seasons).) The case for adjudicating the CEQA merits here is significantly greater. It more closely resembles *Watershed Enforcers v. Department of Water Resources* (2010) 185 Cal.App.4th 969, 978, another major dispute involving several water agencies. In that case, the court adjudicated the merits of whether DWR was required to obtain a permit from the Department of Fish and Game, even though DWR had already mooted the action by complying with the trial court’s writ of mandate. The court observed that the merits were “of paramount interest to significant issues affecting California water allocation, the State Water Project, and the California Water Plan.” (*Id.* at 978.) The future of the QSA and the Salton Sea deserves no less.

Lastly, the water agencies’ sporadic analysis of the case law does nothing to alter these conclusions. Although the timetable affecting the Salton Sea may be longer in duration than the pesticide registration procedure at issue in *Californians for Alternatives to Toxics v. California Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069, the need is similar: these critical questions of public policy should not be allowed to evade review on the merits any longer. Through ellipses, SDCWA, CVWD and MWD also misleadingly imply that application of the exceptions, as a general matter, are “essentially factual” in nature. (SDCWA/CVWD/MWD RBrief 180 (citing *MHC Operating, Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 215).) Rather,

MHC noted that the two key issues presented *in that appeal* are essentially factual. (*MHC*, 106 Cal.App.4th at 215.)

E. The Evasion of CEQA in this Proceeding Must Be Overcome to Restore Trust and Accountability in Water Matters Statewide.

The water agencies claim to recognize the Legislature's "statutory goal of expediting and streamlining CEQA litigation." (SDCWA/CVWD/MWD R/Brief 169; accord, Pub. Res. Code, § 21167.1 (priority for CEQA actions); *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1518 (statutory purpose to avoid delay and promptly resolve CEQA claims).) Indeed, the "purpose to ensure *extremely prompt resolution*" of actions challenging an agency's compliance with CEQA "is evidenced throughout the statute's procedural scheme." (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500 (emphasis added).)

But none of the cross-respondents' briefs address their inherent irony: that honoring their request to affirm dismissal of the environmental claims as "moot" eight years after filing -- despite the trial court's complete failure to address the CEQA merits of a project the water agencies clearly wish to continue -- would undermine the statutory purpose to promptly resolve CEQA challenges. (See County R/XA/Brief 80-81.) That is particularly the case here, where the trial court's refusal to adjudicate CEQA followed seven requests and full merits briefing. Failure to adjudicate the CEQA merits will unnecessarily perpetuate the uncertainty of both California's Colorado River water allocations and the viability of the Salton Sea. (See *id.* at 80.)

Addressing CEQA's requirement of prompt resolution in the context of CEQA *petitioners'* delay, *County of Orange v. Superior Court* (2003)

113 Cal.App.4th 1, 16, noted that to prevent CEQA from resembling a “guerrilla war of attrition,” the Legislature structured the “legal process” for a CEQA challenge to be speedy.²² As the present case demonstrates, however, *respondents* are also fully capable of conducting and unjustly benefiting from their war of attrition.

Of greater institutional moment, failure to hold the water agencies accountable for the “meticulous” process that CEQA requires, *PCL v. DWR*, 83 Cal.App.4th at 911, would risk disastrous consequences, not simply for the Imperial Valley but for the public accountability of water use and supply decisions statewide. If the water agencies in the present proceeding succeed in frustrating the efforts of the public and private CEQA petitioners to secure merits review, this proceeding will then become the template for future water planning: follow the QSA example of conducting a superficial and dishonest CEQA assessment, coupled with the campaign of courtroom attrition that insulates that assessment from judicial accountability. “Success” by the QSA water agencies here is guaranteed to perpetuate the distrust with which substantial communities in California view the State’s water institutions, and frustrate efforts by the California

²² See also *id.* at 15: “The Legislature has provided for expedited review of CEQA cases. (See Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations from NEPA’s Progeny* (1992) 16 HARV. ENV. L. REV. 207, 235 (noting that the ‘timing provisions’ of CEQA ‘embody a clear legislative imperative to hasten the judicial review process in order to prevent expensive and wasteful delays’).)” Or as explained by one of California’s leading CEQA practitioners, CEQA litigation is subject to excess delay and should proceed “more expeditiously.” L. Rothman, *CEQA Turns 40* (presentation at State Bar Environmental Law Conference in Yosemite (Oct. 22, 2010) at 19.

Governor and Legislature to build a consensus of risk-takers in future water investments.

F. IID Irresponsibly and Falsely Accuses the Cross-Appellants of Inflicting Delay.

IID asserts that “cross-appellants’ claims of CEQA-delay are self-inflicted.” (IID RBrief 150-153.) In context, each of IID’s accusations are clearly untrue, and cannot stand uncorrected.

IID first repeats its time-worn charge that “[b]ecause *the County was adamant that nothing should occur* in the QSA Cases while it sought appellate relief, this Court issued a stay of all the QSA Cases on March 30, 2005.” (IID RBrief 151 (emphasis added).)

This charge is false. In fact the county did not seek a stay or delay in the QSA cases. Rather than requesting a preliminary order from this Court in case C048984, the county’s petition requested that the writ issue before the trial court’s May 6, 2005, status conference so that the “County’s case against the State Board and CEQA cause of action against the transfer agreement can be restored with minimal disruption and tried concurrently with the other coordinated CEQA cases.” (RJN2:20:1057.)²³ In its subsequent reply memorandum, on both the cover page and in text, the county again requested that a writ be issued by May 6, 2005, or as soon thereafter as possible. (RJN2:21:1059-1060.) Far from being “adamant that nothing should occur in the QSA cases while it sought appellate relief,” the county *never* sought a stay of the superior court proceedings.

IID also fabricates delay from its carefully edited statements drawn

²³ “RJN2” refers to the county agencies’ motion requesting judicial notice concurrently filed with their reply briefs. Citations to RJN2 are: RJN2:vol:no:page(s).

from years of superior court proceedings, in which the county's counsel proposed minor schedule adjustments or supported those of others. For example, IID asserts that the county sought to *postpone* demurrer hearings on calendar for January 31, 2008 because counsel has "to be in San Francisco Superior Criminal Court first thing" (IID RBrief 152.) But the county's counsel actually addressed this schedule conflict by requesting that the superior court hear the matter last on the calendar *the same day*. (RT-1/10/08:3:688.)

As a second example, IID asserts that the county "again" asked to "continue the January 31 hearings—this time to February 28," and later made a similar request to the trial court. (IID RBrief 152.) IID again omits the context. The superior court's January 31, 2008 tentative ruling, at the last moment and on the court's own initiative, moved the hearing date on pending motions to February 5, 2008, the statewide primary election day. In the hearing on January 31, 2008, counsel for the air district noted that this last-minute change would leave her unable to vote, and counsel for the county proposed moving the matter to February 28 because a status conference was already scheduled for that day. (RT-1/31/08:3:728-730.) The county's lead counsel elaborated on this request, noting that he had made a commitment to the Alameda County Registrar of Voters to serve as an election observer on February 5. (Supp.AA:123:1226:030611-030612.) Not only did counsel's request not attempt to derail CEQA review; it was not even granted.

IID's other examples are equally unfounded. IID references the county's request to extend for two weeks time to file motions to intervene or consolidate. (Supp.AA:125:1266:31200-31207; AA:7:49:01680-01682.) However, IID fails to disclose the purpose of this request: to allow an opportunity for the parties to reach agreement and thereby "avoid the need"

for contested motions. (Supp.AA:125:1266:31202.)²⁴

IID also asserts that the county requested “numerous delays” in the schedule for motions and other hearings (IID RBrief 152.) But these “numerous” requests amounted to two, and the “delay” would have been one week in each case. (See Supp.AA:141:1396:035071-035074); Supp.AA:145:14391440; Supp.AA:146:036461 (request granted).) In sum, IID’s baseless charges of county-caused delay provide no basis to justify IID’s and the other water agencies’ years of campaigning to evade the pending environmental claims.

III. THE WHEELING STATUTE DOES NOT AUTHORIZE ADVERSE COUNTY IMPACTS AT THE WATER AGENCIES’ SOLE DISCRETION.

The water agencies defend the superior court’s dismissal of the county agencies’ Water Code section 1810 wheeling claim on three grounds: “local governments have no role” in the transfer of water from IID to SDCWA through MWD’s aqueduct (IID RBrief 66-68; SDCWA/CVWD/MWD RBrief 147-153); because SDCWA and MWD created an “exchange agreement” to effectuate the transfer of water from IID to SDCWA through MWD’s facilities, that transfer of water is not “wheeling” within the meaning of the wheeling statute (IID RBrief 73-83; SDCWA/CVWD/MWD RBrief 153-158); and because the exchange agreement between SDCWA and MWD has been validated “by operation of law,” that validation precludes the county agencies’ section 1810 claim

²⁴ Because the water agencies subsequently declined to consent to intervention, the county filed its motion to intervene in case 1653. The superior court, allowing focused intervention, found the motion timely and noted the still-recent lifting of its own order preventing earlier filing of it. AA:7:53:01741-01742. Thus even with the two-week extension, no delay in superior court occurred.

(IID RBrief 68-71, also incorporating 45-55; SDCWA/CVWD/MWD RBrief 158-160). Because the superior court grounded its dismissal in its erroneous conviction that the county agencies' claim "effectively challenges the MWD-SDCWA Exchange Agreement" (Supp.AA:187:1846:046743), and the water agencies invest so heavily in their "validation by operation of law" arguments, the county agencies reply to the water agencies' defenses in reverse order.

A. The County Agencies Did and Need Not Challenge the Exchange Agreement to Set Aside the QSA and Transfer Agreement for Failing to Obtain the County's Impact Findings.

The superior court and water agencies err in their premise that the county agencies challenged, or needed to challenge, the exchange agreement. The water agencies take many pages to describe the rationality and benefits, in contrast to traditional "wheeling," of the exchange agreement. And on this score the county agencies agree; as set forth in its cross-appellant brief, the county respects and appreciate the legal rationale and hydrologic benefits of this arrangement. (*Op. cit.* 69-72.) Without either contesting or conceding the matter, the county agencies proceed, assuming the exchange agreement facially valid.

More importantly, the agreement's facial validity does not affect one way or the other the county agencies' independent legal claim that the transfer of water from Imperial County to San Diego, through an aqueduct owned by third-party MWD (as the superior court correctly found (Supp.AA:187:1846:046743)) only take place without adversely affecting the county's economy or environment.

1. Compliance with the Wheeling Statute Does Not Invalidate the Exchange Agreement.

The water agencies have not identified any provision in the exchange agreement that would be rendered invalid if the only water passing through the CRA were that which export from Imperial County did not produce adverse effects there. Instead, IID in a paradigm of illogic asserts without substantiation that enforcing the duty of no harm to Imperial County “would obtain the effect of invalidating the MWD-SDCWA Amended Exchange Agreement.” (IID RBrief 71.) That assertion is simply false; if enforcement of section 1810 means that (say) only 50,000 afa rather than 200,000 afa are available for exchange, the agreement can lawfully govern the mechanics of such conveyance; the water barons need not throw out the bath tub with the bath water.²⁵

The other three water agencies pose a conflict where none inherently exists: “the parties’ actions under the Exchange Agreement are governed by the contract between the parties and not limitations under the Wheeling Statutes.” (SDCWA/CVWD/MWD Brief 161.) Again, no citation appears to a provision of either the agreement or the Water Code that makes conveyance under the exchange agreement, and protection of the county’s environment and economy, mutually exclusive. The exchange agreement does not require disobedience of section 1810.

²⁵ Aside from modest “early transfer water” totaling 10,000 af to be delivered in years 2020-2022, the exchange agreement specifies that the amount of water “to be transferred to SDCWA [shall be] in accordance with the Transfer Agreement.” *Op. cit.* ¶¶ 3.1(b), 3.1(c); Vol-10:Tab-233:AR3:CD1:10949.

2. As a Valid Contract, the Exchange Agreement is Conditioned on San Diego's Compliance with the Water Code.

Rather than being presently immune to section 1810, as the water agencies argue, the exchange agreement actually *requires* compliance with applicable provisions of California law. The agreement's presumed validity is buttressed by its paragraph 9.1, which requires that it "and the activities described herein are contingent upon and subject to compliance with all applicable laws." (Vol-10:Tab-233:AR3:CD1:10960.) Indeed, SDCWA represented that it "will have obtained such approvals and permissions as may be necessary, under applicable laws of the United States and State of California, to Make Available to Metropolitan Conserved Water and Canal Lining Water pursuant to this Agreement." (Op. cit, ¶ 2.2(c), Vol-10:Tab-233:AR3:CD1:10947.)

For these reasons, the county agencies by their validation answers in case 1649 (Supp.AA:71:829:017661) and county mandate petition in case 1656 (Supp.AA:4:13:00941; Supp.AA:44:528:010802) properly placed at issue, enforceable against all three water agencies including SDCWA, their duty to meet the requirements of Water Code section 1810. Because the transfer agreement governs the amount of water to be conveyed (footnote 25, *supra*), it is sufficient to require that the transfer agreement conform to section 1810.

3. The Water Agencies' "Validation by Operation of Law" Fantasy Cannot Be Tolerated.

Even if the viability of the county agencies' Water Code claims depended on a need to invalidate the exchange agreement, the water agencies could not prevail because that agreement should not be deemed in the specifics of this proceeding "validated by operation of law."

a. The Sacramento Superior Court Correctly Found that a Previously Filed Challenge to the QSA Contracts Was Disabled Through IID's Misleading Tactics.

Before this proceeding became a coordinated one, and was transferred to Sacramento, the Imperial County Superior Court was asked by IID to dismiss a reverse validation action that attempted to address more than the 13 contracts identified in IID's validation complaint. IID succeeded in convincing the Imperial Superior Court not to allow the reverse validation (case 1643, the first one filed against the QSA-related agreements), based on IID's representation that its case 1649 addressed the same subject.

Years later the Sacramento Superior Court found serious fault with IID tactics:

It appears that IID represented a limited if not somewhat misleading scope of the direct validation action to the Imperial County Court. IID stated in its opposition to the Case 1643 plaintiffs' ex parte application for permission to publish summons in their reverse validation action that it had "already brought a validation action ... pertaining to the same subject matter."

(AA:47:292:12712.)

Nonetheless, the Sacramento Superior Court believed itself bound by the unjust result:

The failure of the Case 1643 parties to fairly focus the Imperial County Court on the difference in potential scope between the then pending reverse validation case (including all of the QSA related agreements) and the more limited scope of the direct validation action in Case 1649 is unfortunate. Nevertheless, the Imperial County Court order has long since been final.

(AA:47:292:12753.)

This unfortunate circumstance should influence the Court's application of validation law. (See section 3.c, *infra*.)

b. The *Commerce Casino* and *Hollywood Park* Cases Do Not Support "Validation by Operation of Law."²⁶

Contrary to IID's contention, *California Commerce Casino Inc. v. Schwarzenegger* (2007) 146 Cal.App.4th 1406, does not stand for the proposition that, once a matter is validated by operation of law under the validation statutes, any related matters can only be validated. (See IID RBrief 46-47, incorporated at RBrief 71.) Rather, *Commerce Casino* was a statute of limitations case explaining that the 60-day statute of limitations under the validation statutes applied to the legislation ratifying the amended compacts because an attack on the legislation effectively was an attack on the validity of the amended compacts. Since those amended compacts were "inextricably intertwined with the intended use of the income stream created by them and with bonds to be issued, the lack of a prompt validating procedure to validate the compacts would frustrate the statutory purpose of [the ratifying legislation]." (*Commerce Casino*, 146 Cal.App.4th at 1430-1431.) According to IID, "From the text of the compacts, this Court will see that their effectiveness was contractually dependent on the legislation." IID then cites one paragraph of these nearly identical agreements, which states, "This Amended Compact shall not be effective unless and until all of the following have occurred: (1) The

²⁶ The paragraphs that follow largely represent the county's adoption of portions of the opposition of Cuatro del Mar to IID's request for judicial notice of five contracts asserted to be at issue in the *Commerce Casino* case.

amendment herein is ratified by statute” (IID RBrief 46-47 (emphasis IID’s).)²⁷

The *Commerce Casino* holding turned completely on the statute of limitations and the fact that further challenges to the related agreements were time barred. Despite this clear holding, IID erroneously argues that *Commerce Casino* stands for the proposition that the thirteen QSA contracts identified in IID’s validation complaint cannot be invalidated because their terms are inextricably bound up with those of the contracts that IID did not tender.

The gaming compacts at issue in *Commerce Casino* were originally executed between Governor Davis and federally recognized tribes in 1999 to allow the tribes to operate limited Nevada-style gambling machines. A proposition was approved in 2000 to amend the State Constitution to permit tribes to operate this type of gaming pursuant to state-tribal compacts. (*Commerce Casino*, 146 Cal.App.4th at 1412.) Four years later Governor Schwarzenegger and five of the tribes amended their compacts to allow the tribes to operate more than 2,000 slot machines, for which the tribes paid substantial fee increases. (*Ibid.*)

Accordingly, the terms of the *Commerce Casino* amended compacts that purportedly show how those compacts were “inextricably bound up”

²⁷ The Court need not read beyond the *Commerce Casino* opinion itself to discern that the compacts did not become effective until the legislation was enacted. 146 Cal.App.4th at 1431. That explains the Court’s observation that a “challenge to the validity of Assembly Bill 687 is at the same time a challenge to the validity of the amended compacts.” *Ibid.* For these reasons IID’s request for judicial notice of the compacts themselves need not be granted. See county agencies’ opposition to IID RJN, concurrently filed.

with the ratifying legislation are irrelevant to the validity of the unchallenged QSA agreements.

Under the amended compacts, the tribes received the right to sue for injunctive relief to prevent the operation of competing games by non-Indian casinos in their core geographic markets. (*Commerce Casino*, 146 Cal.App.4th at 1413.) In exchange for this monopoly, the tribes collectively agreed to pay the State at least \$100 million a year for 18 years, which the State would use to pay off up to \$1.5 billion in transportation bonds. (*Ibid.*) The amended compacts expressly provided:

[I]t is the State's intention to assign these . . . revenue contributions totaling at least \$100 million annually to a third party for purposes of securitizing the 18-year revenue stream in the form of bonds that can be issued to investors.

(*Id.* at 1413 (emphasis added).)

The compact amendments were ratified by Assembly Bill 687, which was passed on July 1, 2004. (*Commerce Casino*, 146 Cal.App.4th at 1413.) As an urgency statute, AB 687 took immediate effect "to ensure that sufficient funds [were] available when needed to fund essential transportation programs and to ensure that the revenues available under the amended tribal-state compacts ratified pursuant to this act [were] made available to the state as expeditiously as possible . . ." (*Ibid.*; 2003-2004 Assem. Bill 687, § 5.)

The plaintiffs in *Commerce Casino* attempted to challenge the constitutionality of AB 687, but not did not do so until eleven months after the legislation was passed. The superior court dismissed the lawsuit as time barred under the validation statutes (Code Civ. Proc., §§ 860 *et seq.*), because the constitutionality of AB 687 should have been challenged within 60 days of the *enactment of the legislation* (not the execution of the

amended compacts). The essential issue on appeal addressed the statute of limitations that applied to the plaintiffs' constitutional challenge to AB 687. (*Id.* at 1410.)

Although plaintiffs asserted their complaint only attacked the constitutionality and validity of AB 687 and not any matters authorized by AB 687, the court found that appellant's action would, if successful, invalidate the concurrently-effective amended compacts, and therefore had to be governed itself by the validation statute of limitations. (146 Cal.App.4th at 1410.) The court concluded that the various theories raised in appellant's complaint should have been tested in a validation action within 60 days of the enactment of AB 687, and dismissed the appeal as untimely. The court explained this finding as follows:

Because the amended compacts are inextricably intertwined with the intended use of the income stream created by them and with bonds to be issued, the lack of a prompt validating procedure to validate the compacts would frustrate the statutory purpose of Assembly Bill 687. The amended compacts are . . . "inextricably bound up" with the use of the income stream created by the amended compacts and with the bonds to be issued. [Citation omitted.] That is because the negotiated amended compacts are an "integral part of the whole method of financing" (*ibid.*) the state's "transportation programs and [are needed] to ensure that the revenues available under the amended tribal-state compacts ratified pursuant to [Assembly Bill 687] are made available to the state as expeditiously as possible . . ."

(*Id.* at 1431.)

The *Commerce Casino* opinion makes clear that the plaintiffs' constitutional challenge was dismissed because it was untimely, *not*

because the amended compacts had been “validated by operation of law.”²⁸ In fact, the court expressly held that “both of [the] alleged infirmities in the amended compacts *should have* been tested [by plaintiffs] in a timely reverse validation action.” (*Id.* at p. 1431 (emphasis added).)

Commerce Casino’s holding and relevance was summarized in the companion case, *Hollywood Park Land Co., LLC v. Golden State Transportation Financing Corp.* (2009) 178 Cal.App.4th 924, which IID also claims supports its position as cross-respondent. (IID RBrief 46-47, 71.) *Hollywood Park* also explains that the legislation at issue in *Commerce Casino* was subject to the validation procedures because the contracts at issue and legislative purpose coincided:

[I]n *Commerce Casino* . . . the Court of Appeal upheld the Los Angeles County Superior Court’s ruling that the action challenging the constitutionality of Assembly Bill 687 was time-barred because it was not filed within 60 days of the Legislature’s ratification of the amended compacts . . . A resolution of this issue depended on whether the plaintiffs’ challenge to Assembly Bill 687 was subject to the validation statutes, which rendered it necessary to address the principal issue on appeal—i.e., whether plaintiffs’ challenge to Assembly Bill 687 was the equivalent of a challenge to the validity of the amended compacts, which had to be filed in the trial court within 60 days of the ratification of the amended compacts . . . [¶] Not all contracts are subject to validation . . . only “those that are in the nature of, or directly

²⁸ Contrary to the impression created by IID’s sleight of hand at page 46 of its cross-responding brief, the *Commerce Casino* court never invoked “validation by operation of law.” IID’s text reads: “The Commerce Casino decision held . . . if the lawsuit were successful, it would have the *effect* of invalidating the amended compacts (*Id.* at p. 1410), which had already been validated by operation of law. (Emphasis added.)” By not placing “(Emphasis added.)” properly at the page citation, but rather after its own words, IID suggests that “validated by operation of law” are the words of the court.

relate to the state or a state agency's bonds, warrants, or other evidences of indebtedness." [Citation omitted.] In [*Commerce Casino*], the amended compacts met this requirement because they were "inextricably intertwined with the [S]tate's intended use of the income stream created by them and with the bonds to be issued at a later date. Therefore, the ability of the five tribes and the [S]tate to accomplish the statutory purpose of Assembly Bill 687 'would be substantially impaired absent a prompt validating procedure as to such contract[s].'"

(*Id.* at pp. 934-935 (citing *Commerce Casino, supra*, 146 Cal.App.4th at 1417-1433).)

In the present case, by contrast, the purpose of Water Code section 1810 and the exchange agreement do not coincide; as shown in pages 28-30, *supra*, a timely challenge to the water agencies' failure to protect Imperial County's economy and environment does not coincide with or emerge "inextricably intertwined with" a challenge to the legitimacy of a subsequent agreement for MWD to convey an unspecified amount of water for use in San Diego's service area. *Commerce Casino* and *Hollywood Park* do not, on the asserted exchange agreement's "validation by operation of law," vitiate the county agencies' Water Code challenge.

c. The Water Agencies' Argument Disrespects Constitutional Limitations that Prevent Abuse of Validation Procedure.

As the county noted at trial, California's validation procedure can intentionally or unwittingly become a potent weapon, often producing consequences not anticipated by those who invoke or respond to it. (Accord, *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, 341-342.) For that reason, the county argued, the validation process requires its participants to adhere to the highest standards of procedural regularity and fairness. (RT-12/1/2009:11:3168, 3176-3179.)

While the county agencies have not joined other parties who claim that IID denied due process in the initial stages of the validation proceeding at issue in this cross-appeal, and that IID's simultaneous and successful resistance to a reverse validation claim that would have placed the validity of all the QSA-related claims (including the exchange agreement) at issue,²⁹ the county agencies observe that the United States Supreme Court carefully reviews state-court in rem proceedings to ensure that their extraordinary procedures meet constitutional standards of fairness. (See *Tulsa Professional Collection Services, Inc. v. Pope* (1988) 485 U.S. 478; *Mennonite Bd. of Missions v. Adams* (1983) 462 U.S. 791.) When infirmities are found, they are not those of the parties to the proceeding, but those of the state-court system (the "state action") that enables the unfair result. (*Tulsa*, 485 U.S. at 485-488.)

In the county agencies' view, the water agencies' "validation by operation of law" arguments essentially invite this Court to reward IID's manipulation of California validation procedure to produce an unfair result that the superior court erroneously believed itself powerless to correct. By rejecting those arguments here, the Court can confine this validation procedure, as manipulated by IID in the Imperial County Superior Court, to constitutional standards.

B. The Statute Requires that in Wheeling or Exchange, No Adverse Effects be Suffered in the County of Transfer Origin.

The county's opening brief establishes that the wheeling statute applies equally to classic wheeling and exchange agreements (Stats. 1986, ch. 918, § 1; Wat. Code, § 1813), that it applies to all conveyances in the

²⁹ See Cuatro del Mar RBrief 104-113; Morgan/Holtz RBrief 102-109.

state, including those deemed “voluntary” (Stats. 1986, ch. 918, § 1), and that its protection extends not as IID contends to “areas” (IID RBrief 67) but expressly to *counties* (see Supp.AA:176:1714:043761 (text of statute drawn verbatim from Inyo County resolution).) In response, the water agencies contend that in the wheeling statute, local government has no place.

In reply, it bears emphasis that not only did the parties to the water transfer and conveyance arrangement not secure the county’s adverse impact finding. *No* entity, including those nominated by the water agencies, made the finding that the use of MWD’s conveyance facility will be made “without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred.” (Wat. Code, § 1810, subd. (d).) That deficiency remains, notwithstanding the directive of the Department of Water Resources in its official guidance that “public agency facilities cannot be used to convey transferred water if ... the overall economy or environment in the county where the water originates would be unreasonably affected (Water Code Section 1810(d))” (Vol-10:Tab-214:AR1:CD15:505433), and that “State law prohibits the use of public facilities unless a finding is made of no unreasonable impact on the overall economy of the county from which the water is being transferred (Water Code Section 1810(d)” (Vol-10:Tab-214:AR1:CD15:505434 (CAL. DEPT.OF WATER RESOURCES, WATER TRANSFERS IN CALIFORNIA: TRANSLATING CONCEPT INTO REALITY (Nov. 1993) 10, 11).)

Thus the water agencies cannot claim that the county impact requirement has been met by *anyone*. On that ground alone the county agencies are entitled to judgment on their specific Water Code allegations. (RA:1:10:00191-00192; Supp.AA:44:528:010802.) The water agencies’

responding briefs do not counter the illegality of QSA operation that section 1810 serves to prevent.

1. Whether By Literal Wheeling or Exchange Agreement, Transfer of Water Through Metropolitan's Aqueduct Produces Imperial County Impacts Not Possible in the Aqueduct's Historic Operation.

Why does the statutory preamble ensure that the no-adverse-county-impact standard be met by exchanges as well as transfers? Answer: because the proprietary terms of conveyance of water through the aqueduct do not define the impacts that can be suffered by withdrawal of the water from the county of origin. The statute addresses the reality that operating an aqueduct to transport water, other than that being extracted by the aqueduct owner itself from the place of aqueduct origin, will produce impacts that were neither contemplated nor possible at the time the aqueduct was constructed and placed into use. Recognizing this reality, the Legislature authorized and encouraged aqueduct owners to operate in a new way, conveying water made available by an outsider, but conditioned that authority and encouragement on the duty to produce no harm. That duty is enforced through the findings requirement of section 1810(d).

2. The Water Agencies' Reading Would Enable a Transferor, Transferee, and Aqueduct Owner to Collaborate in the Destruction of the County's Economy and Environment.

Nonetheless, the water agencies respond, whoever defines that duty, it is not the county of origin. But only the county can be entrusted to protect its environment and economy. As this proceeding has shown, IID and its water agency collaborators are more devoted to each other than to the Imperial County environment. The QSA represents one enterprise in

which water is indeed thicker than blood. (Contra, WALTER SCOTT, GUY MANNERING (1815).)

The county agencies acknowledge that the wheeling statute could have more clearly defined the responsibilities of each of the “respective public agencies” for the findings required by that law. (Wat. Code, § 1813.) Indeed, the Secretary for Resources recommended that the Governor veto the wheeling bill, because “[t]here remains some concern over how and who would make the findings related to these transfers under AB 2746.” (Supp.AA:176:1714:043801.)

Presented with this imprecision in the statute, the duty falls to the Court to extract from the text the meaning that salvages the legislative purpose. (See *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 258-267 (Supreme Court defines imprecise term “project” to effectuate legislative intent of environmental protection).) Because here the Legislature sought to authorize only transfers that did not create adverse environmental or economic effects in the county of transfer origin, that intent is carried out by entrusting the county impact finding to the county’s governing board.

IV. PRAYER FOR RELIEF

- A. In both Validation and Mandate, the Court Should Vacate the QSA and Transfer Agreements and their Environmental Approvals, but Consider Allowing Transfers Subject to Maintenance of Salton Sea Level and Salinity.**

For reasons stated above and in their respective cross-appellant briefs, the county agencies request that the Court:

In case 1649 affirm judgment, additionally on grounds also advanced in the cross-appeal, that both the state-QSA and transfer

agreements are invalid and must be set aside. The county agencies further request affirmance that the state-law agencies' (the four water agencies') approvals of the Colorado River Water Delivery Agreement (CRWDA) are invalid and must also be set aside, a judgment binding by virtue of section 390uu of title 43, United States Code, on the United States.

In cases 1653 and 1658 direct issuance of writs of mandate setting aside the state-QSA and transfer agreements, for failure to comply with the California wheeling statute; and setting aside the state-QSA, transfer agreement, and their environmental findings and certifications, for failure to comply with CEQA.

These contracts and their underlying water reallocations have been under challenge from their beginning; as the superior court correctly observed, the water agencies have been proceeding at their own risk pending final judgment. (AA:7:46:01655.) This proceeding is thus not one of challenging an ongoing project, where the pre-existing equities in an area of water consumption must be balanced against those in the area of water origin. (Cf. *County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 95, 99-101 [*Inyo II*].) The QSA-benefiting water agencies, principally MWD and SDCWA, do not bring any entitlement, legal or equitable, to continuation of the QSA-related transfers to them; they have assumed the risk of their injunction. (*Woodward Park Homeowners Association v. Garreks*, 77 Cal.App.4th at 890.)

Moreover, in the CEQA writ cases, complete set-aside of the EIRs and their certifications is amply earned. These EIRs are not so confined in their legal errors as to merit the exceptional practice of only setting aside part of them or the decisions on which they were premised (cf. Pub. Res. Code, § 21168.9); their fundamental "mass of flaws" demand total rejection

(San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1994)
27 Cal.App.4th 713, 741-743).

Finally, the water agencies' conduct in these proceedings, including IID's initiative attempting to confine and eliminate the participation of the general government and air-quality regulator of the Imperial Valley, do not earn any greater equities than those they brought in October 2003. The County of Imperial asserts its need for justice, not just on the legal merits, but also for the extraordinary expense it has incurred by the water agencies' tactics, and above all for having consistently been excluded from the community of those who make decisions affecting California's Colorado River use. An unambiguous judgment from this Court unconditionally terminating the QSA, and the anxiety that would impose on the water agencies and the all-too-absent federal government, would be well-earned.

The county agencies did not and do not prosecute their claims, however, to bring down the entire reallocation of the river or wreak injury on those responsible for it. The county agencies seek protection of the Imperial Valley's environment and economy. Those ends can perhaps constructively be reached if, notwithstanding a judgment of invalidity and issuance of mandate, the QSA proponents are once again offered the opportunity to continue in a form that stabilizes at -230.5 feet msl the level and salinity of the Salton Sea, and maintains the project beneficiaries' limited payments to the Imperial Valley community.

The definition of relief to accompany this Court's judgment must be made by this Court; the county agencies cannot afford to run another near-decade-long gauntlet in the superior court while their environment comes closer to the point of no return, and the water agencies "enjoy" incentive to further delay, delay, delay; and lack incentive to collaborate with all

interested parties in redefining a worthy river realignment. Perhaps the Court from its disinterested and institutional perspective will conclude that both justice and judicial administration, as well as ultimate resolution of the underlying disputes, best be served with unconditional termination of the QSA and restoration of the *status quo ante*. Such a decision offers the simplicity of complete finality in this Court and the superior court.

If, on the other hand, the Court is willing to entertain some discretion in ordering relief, it can by opinion and remittitur establish conditions under which the QSA-related agreements are allowed to proceed, and order the superior court to retain jurisdiction to enforce those terms. (See *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 212-213; *Inyo I*, 32 Cal.App.3d at 815-816.)³⁰

To guide the Court should it wish to order relief other than unqualified vacation of the QSA-related contracts that the county agencies have challenged, the county agencies have included in their concurrently-filed request for judicial notice the evidence that they presented to the Court one year ago in response to the cross-respondents' petition for writ of supersedeas. The county agencies also restate in the next section the county agencies' plea, originally presented in response to supersedeas, that the Court's relief prove effective in both judicial administration and environmental protection.

³⁰ *California Trout* also serves as precedent for the Court to order an entitlement to fees in amount to be determined by the superior court. 218 Cal.App.3d at 213; accord, *PCL v. DWR*, 83 Cal.App.4th at 926.

B. This Court's Injunction Experience Counsels a Stringent Restraint on Harmful Transfers from Imperial Valley.

Three leading water disputes in this Court illuminate the benefit of and need for stringent injunctive relief to bring water agencies into legal compliance and avoid environmental harm: *County of Inyo v. City of Los Angeles*, *California Trout v. Superior Court*, and *PCL v. DWR*.

In the *Inyo* series of cases, the Court addressed the setting of an interim pumping rate to govern Los Angeles' Owens Valley groundwater pumping while awaiting an EIR on that project. Initially setting the rate at that prevailing on CEQA's effective date, or 89 cfs (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 815 [*Inyo I*]), the Court referred the matter twice to the superior court for refinement, which produced high pumping rates that this Court ultimately rejected in favor of one at 149 cfs (*Inyo II*, 61 Cal. App. 3d at 101); Inyo County argued for reversion to 89 (*id.* at 96). The Court's concern with environmental harm at the 149 cfs rate was moderated by this premise: "It is reasonable to expect that the primary issue (i.e., the city's compliance with CEQA) will be resolved within the near future." (*Id.* at 98.)

As is now known, while that moderate restriction remained in place, the Court's writ of mandate remained at large for many years. Not once, but twice, Los Angeles prepared EIRs that the Court forcefully rejected. (*Inyo III*, 71 Cal.App.3d 185; *County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1 [*Inyo V*].) What finally brought the contending parties to a tentative peace and experimentation with joint decision-making, and holding Los Angeles' feet to the fire, was the condition of this Court's allowance of that venture: if the agreement failed, the city had one year to prepare a final EIR or the pumping rate would revert to 89 cfs. (*County of*

Inyo v. City of Los Angeles (1984) 160 Cal.App.3d 1178, 1186-1187 [*Inyo VI*].)

At the one moment in the *Inyo* sequel in which the 149 cfs rate hurt, during the height of the 1977 drought, this Court refused to raise the pumping level until Los Angeles installed mandatory water conservation. (Preliminary Memorandum, *County of Inyo v. City of Los Angeles*, 3 Civil 13886 (March 24, 1977).)³¹ In response, the city did so, and nearly immediately secured 19 percent savings; indeed, two decades later Los Angeles used less water than prior to this Court's 1977 then-effective limitation, because of that injunction. (*Water Conservation Efforts Paying Off in S. California*, Los Angeles Times (June 14, 1999) § I, p. 1.) The *Inyo* lesson seems clear: without an effective restraint pending legal compliance, the consequences will be delay and environmental harm; with such a restraint, out of conflict come progress and cooperation.

This Court and Los Angeles set that example again in the Mono Lake dispute. Mono Lake water elevation declined approximately 45 feet between 1941 and 1989 due to water diversions from tributary streams by

³¹ This memorandum is quoted in relevant part in A. Rossmann & M. Steel, *Forging the New Water Law* (1983) 33 HASTINGS L.J. 903, 919, fn. 106.

Los Angeles then reapplied to lift the pumping rate, joined by MWD, arguing hardship, even though this Court had firmly rejected the city's EIR in the interim, *Inyo III*, 71 Cal. App. 3d 185, and Colorado supplies were then ample. Unknown to *Inyo* at the time, San Diego was preparing also to install mandatory conservation if this Court refused to relax its limitation. When the pumping rate was lifted, San Diego shelved that measure. *L.A. Wins Water Case, Fears Eased Here for Rationing*, San Diego Union (July 28, 1977) § II, p. 1: an example not to be repeated.

the City of Los Angeles. (RJN2:3:138.) The exposed lake bed produces severe episodes violating the PM₁₀ NAAQS. On November 20, 2009, the highest hourly concentrations of PM₁₀ ever was measured at Mono Lake at over 60,000 µg/m³ – more than 400 times the 24-hour PM₁₀ NAAQS standard of 150 µg/m³. (RJN2:3:140.)

In *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, this Court ordered the SWRCB to condition the city's Mono Basin diversions on Fish and Game Code sections 5937 and 5946 to maintain a fishery in good condition below the diversion dams. When the superior court subsequently refused to order that result, this Court granted an original writ of mandate compelling such a mandatory injunction. (*California Trout, Inc. v. Superior Court*, 218 Cal.App.3d 187.) With wet water now flowing into Mono Lake, the SWRCB concluded its proceeding in 1994 with Decision 1631, recognizing that air quality is a public trust resource that should be a determining factor in water appropriation decisions. (RJN2:3:139.) To this end, both Decision 1631 and the state implementation plan for air quality require Los Angeles' diversions be limited so that the water level in Mono Lake will rise to elevation 6,391 feet by September 28, 2014, and eliminate the lake shore as a source of PM₁₀ emissions. (*Ibid.*) Again, this Court's stringent physical restraint prompted legal compliance and ultimate cooperation.

A third example illuminates the risk of allowing unconditional project operations when modest petitioners are overwhelmed by an army of water agencies. The 1995 Monterey Amendments to the State Water Project contracts (like the initial drafts of the QSA contracts) initially specified that they would not take effect until legal challenges were resolved. On the eve of final judgment against the *PCL v. DWR* petitioners there, the contractors secretly removed that self-injunction, allowing the

contracts to come into effect. The petitioners hastily assembled their appeal and petition for supersedeas, which this Court declined to issue. Four years later, when this Court ultimately sustained petitioners' CEQA challenge on the merits, the Court did not require that the project itself be set aside. (*PCL v. DWR*, 83 Cal.App.4th at 926, fn. 16.)

The consequences have not been benign. In 2000 this Court ordered DWR to produce its own EIR on the Monterey Amendments; that final EIR was not published until nine years later.³² More tragically, in the judgment of the U.S. Fish and Wildlife Service, "changes in how Article 21 [of the Monterey Amendments] is invoked and used have increased the amount of Article 21 and Table A water that has been pumped from the Delta." (RJN2:5:13:990 (US Fish and Wildlife Service Formal Endangered Species Consultation on the Proposed Coordinated Operations of the Central Valley Project (CVP) and State Water Project (SWP) (Dec. 15, 2008) 169).)³³

Of course neither this Court nor the PCL petitioners could have anticipated these outcomes in 1995. They nonetheless remind the authors of this cross-appellant's reply brief of their duty to vigorously advocate in this proceeding for preservation of the Salton Sea's status quo. This time, of course, the burden of proof and persuasion lies with the water districts.

³² See http://www.water.ca.gov/environmentalservices/monterey_plus.cfm.

³³ The same source ironically credits the QSA – promoted here by the water districts as protecting the Delta – as *increasing* Delta exports to Southern California. *Id.*

CONCLUSION

For the reasons stated in these cross-appellant reply briefs, and in their responding and cross-appellant opening briefs, the county agencies request that the Court affirm the judgment in validation, and expand its grounds to include the county agencies' affirmative defenses grounded in the California wheeling statute and CEQA. The county agencies also request that the Court direct the superior court to issue writs of mandate on those grounds in cases 1653 and 1658. As the form of relief, the county agencies request that the Court terminate the QSA and its operation; or alternatively allow the QSA transfers to continue, subject to maintenance of the Salton Sea at a level of -230.5 feet msl and to continuation of payments to landowners and other entities in Imperial County. The county agencies request that the Court require the superior court to award attorneys' fees to them in an amount to be determined by the superior court.

Dated: 9 February 2011

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court section 8.204, subdivision (c)(1), the undersigned counsel hereby certifies that, according to the word count of the computer program used to prepare the County of Imperial cross-appellant's reply brief, the brief contains 13,884 words (excluding the cover page, table of contents, table of authorities, certification of word count, and proof of service). The county on January 12, 2011 received leave of this Court for permission to file this brief in the length of 28,000 words.

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I, **Tiffany Poovaiah**, hereby declare under penalty of perjury as follows:

I am over the age of 18 years and am not a party to the within action. My business address is 380 Hayes Street, Suite One, San Francisco, California 94102.

On **February 10, 2011**, I served the following documents:

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by first class mail postage prepaid at San Francisco, California by depositing in sealed envelope a copy to each of the following persons:

Executed on **February 10, 2011**, at San Francisco, California.

A handwritten signature in black ink, appearing to read 'Tiffany Poovaiah', written over a horizontal line.

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